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No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1945

KIRBY LUMBER CORPORATION, *Petitioner,*

v.

DENMAN KOUNTZE, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

*To the Honorable the Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Summary Statement of Matter Involved

On July 5, 1902, Texas Land and Cattle Company conveyed to John Henry Kirby lands in East Texas, by deed containing reservations and covenants respecting oil (R. 45-54). Respondents, Denman Kountze and J. T. Stewart III, successors to the rights of grantor in said deed, brought suit for declaratory judgment against petitioner, successor in interest to the grantee.¹

¹ R. 2-14—Proceeding was under 28 U.S.C.A., Section 400; Judicial Code, Section 274d. There is diversity of citizenship; value in controversy exceeding \$3000.00.

The substantive issues were thus made by stipulation (*Respondents* substituted for *Plaintiffs* and *Petitioner* for *Defendant*):

"Petitioner admits that Respondents have power to execute an oil lease covering the full estate in the oil in place. The issue to be litigated in this case is the question of whether Petitioner is entitled, upon execution of such a lease by Respondents, to—

"(1) Only 1/20th or 5% of all royalty provided in any such lease, as contended by Respondents, or

"(2) A royalty of 1/20th or 5% of all oil produced, as contended by Petitioner; or

"(3) Both a royalty of 1/20th or 5% of all oil produced, to be paid to it by the lessee, and 1/20th or 5% of all royalties paid by the lessee to Respondents."

The trial court held that the deed was not ambiguous, and that under governing Texas law of minerals and conveyancing, Petitioner was entitled as under the third alternative of the stipulation (R. 117-18). The Circuit Court of Appeals also held that the deed was unambiguous, but that under the Texas laws of minerals and conveyancing Petitioner is entitled as under the first alternative of the stipulation alone (R. 130-39).

Basis of Supreme Court's Jurisdiction

The Supreme Court has jurisdiction to grant writ of certiorari in this cause under the provisions of Section 240 of the JUDICIAL CODE as amended; Title 28, Section 347, U.S. C.A.

There are at issue in this cause generally important questions arising under the mineral laws of the State of Texas and the law of interpretation of mineral conveyances and conveyances in general, which supply the answers to the ulti-

mate legal questions set forth in the above quoted stipulation and below. The Court below misconceived and misapplied the Texas law; and we submit that the result would have been different in the State Court, had the cause been litigated there.

The judgment of the Circuit Court of Appeals was rendered and entered (R. 140, 153 Fed. (2d) 695) and opinion filed (R. 130) on February 18, 1946. This petition is being printed and mailed to reach the Clerk of this Honorable Court prior to the expiration of three months from February 18, 1946.

Questions Presented

The issues are whether the Circuit Court of Appeals, under the laws of Texas governing mineral estates, conveyancing and the interpretation of deeds, erred in the following particulars:

1. In holding that, upon Respondents' executing an oil lease upon the full estate in the oil in place on the lands in question, petitioner is entitled to only 1/20th of the proceeds including royalty provided in such lease.
2. In holding that, upon the execution by Respondents of a lease covering the full estate in the oil in place on the lands in question, Petitioner is not entitled to a royalty of 1/20th or 5% of the oil produced, to be paid to Petitioner by the lessee.
3. In refusing to hold that Petitioner is entitled, upon the execution by Respondents of a lease covering the full estate in the oil in place, both to a royalty of 1/20th or 5% of the oil produced, to be paid to petitioner by the Lessee, and 1/20th or 5% of all proceeds of the lease transaction including royalties which are paid by the lessee to Respondents.

Reasons for Allowance of the Writ

There is involved in the interpretation of the deed in question the Texas municipal law of mineral estates, and of interpretation of instruments both generally and as they create mineral estates. In its opinion the Court below has confused and misapplied principles of Texas law in such manner as to cause a difference in result from what would have been the result had this cause been tried in Texas courts, and to lay the basis for widespread and harmful differences generally in law, and its application, as between the State and Federal jurisdictions, in fields of law upon which vital parts of economy of Texas depend, and in which such confusion and disparity flowing from the "accident of Federal jurisdiction" should not be tolerated. THOMPSON TRUSTEE V. MAGNOLIA PETROLEUM COMPANY, ET AL., 309 U.S. 478, 484; also ERIE RAILROAD COMPANY V. TOMPKINS, 304 U.S. 64; RULES OF THE SUPREME COURT No. 38, Par. 5 (b); RUHLIN V. NEW YORK LIFE INSURANCE COMPANY, 304 U.S. 202, 206 and 208-9; ALICE STATE BANK V. HOUSTON PASTURE COMPANY, 247 U.S. 240, 241; CITIES SERVICE OIL CO. V. DUNLAP, 308 U.S. 208; RORICK V. DEVON SYNDICATE, 307 U.S. 299.

The conceptual basis of Texas law of oil and gas is, almost uniquely, that such substances are owned in place. There may be other interests in the oil which do not amount to ownership of the oil or any part thereof *in place*, such as royalty interests, overriding royalty interests, oil payments. The existence of such is not inconsistent with the ownership of *all the oil in place* by persons other than the owners of such rights. Such rights partake of the nature of rent estates at common law, are incorporeal, and are not ownership of oil or gas in place. They are rights to receive a portion of oil or gas after production and as personalty, or money measured

by production of a portion of the oil so long as it is produced, or money of a designated gross amount to be received as measured by production of a portion of the oil if and as produced until the designated sum is paid. All such are regarded as interests in minerals considered as real estate, taxable and conveyable as real property; but they are incorporeal and are not ownership of minerals in place. Their ownership is not at variance with, but consistent with and often and indeed typically present with ownership of all the minerals in place by others.

The Circuit Court of Appeals has failed to comprehend and apply these fundamentals and distinctions. To it there is no distinction between incorporeal royalty interest and ownership of oil in place; consequently, the key to the proper construction of the deed is lost. It is held that these can not operate together:

(1) A royalty provision which, unconnected with ownership of any of the oil in place, would give to petitioner a right to 5% of gross production *from the lessee—producer*, regardless of ownership of all the oil in place, and

(2) A provision for ownership by petitioner of 5% of the oil in place, with a *right to receive from Respondent*, on lease, 5% of the proceeds of the sale of all the oil in place,

which features are perfectly reconcilable under Texas laws, and coexist by the terms of the deed.

The confusion and destructive result in the Court below are patent from the larger aspects of the opinion. The *first basic premise* is apparently that an oil lease executed by Respondents, reserving royalty, is a conveyance of all the minerals in place, notwithstanding the reservation of royalty. So much is in accord with law. But the Court is either unaware

of its own first premise or does not realize its implication; for the *second basic and determinative premise* is that if, after lease, petitioner is entitled to a 1/20th royalty, the lessee can not have acquired all of the oil in place (R. 137). These two foundations of the result below cannot co-exist. Bringing either into harmony with the other would change the result, and entitle Petitioner to 5% royalty on any lease.

On the basis of its misconceptions of the basic mineral law, and forced and unrealistic "conflicts," the Circuit Court of Appeals misapplies the laws of construction which govern the interpretation of this deed. It leaves without practical operation provisions designed to protect Petitioner and its predecessors in a 5% royalty interest as an incorporeal right disconnected from ownership of oil in place, to be received from the owner of any and all wells drilled on the lands. It does not give effect to all parts of the instrument, does not give effect to manifest intention, and does not indulge the interpretation most strongly favoring the grantee, all established canons of construction under the Texas decisions. *CARTWRIGHT V. TRUEBLOOD*, 90 Tex. 535, 39 S.W. 930.

This Court knows that Texas leads in oil production. The foundations of its mineral law were carefully laid. The conceptual bases were formulated to promote and make stably marketable every character of interest. A decision, such as that of the Circuit Court of Appeals, erasing and destroying within the Federal jurisdiction carefully created basic conceptions which govern in the State Courts, can well lay the predicate for destruction of much that has been accomplished by carefully evolved decisions of the Supreme Court of Texas. Such disparities between State and Federal decisions are particularly against the public interest when they involve, as do those in the present instance, the principles ordering the most important part of a State's economy.

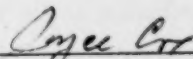
Conclusion

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued as provided by law to the United States Circuit Court of Appeals for the Fifth Circuit, that the case be reviewed and determined by this Court, that your Petitioner may have such relief in the premises as to this Court may seem just, and that the judgment of said Circuit Court of Appeals be reversed by this Honorable Court.

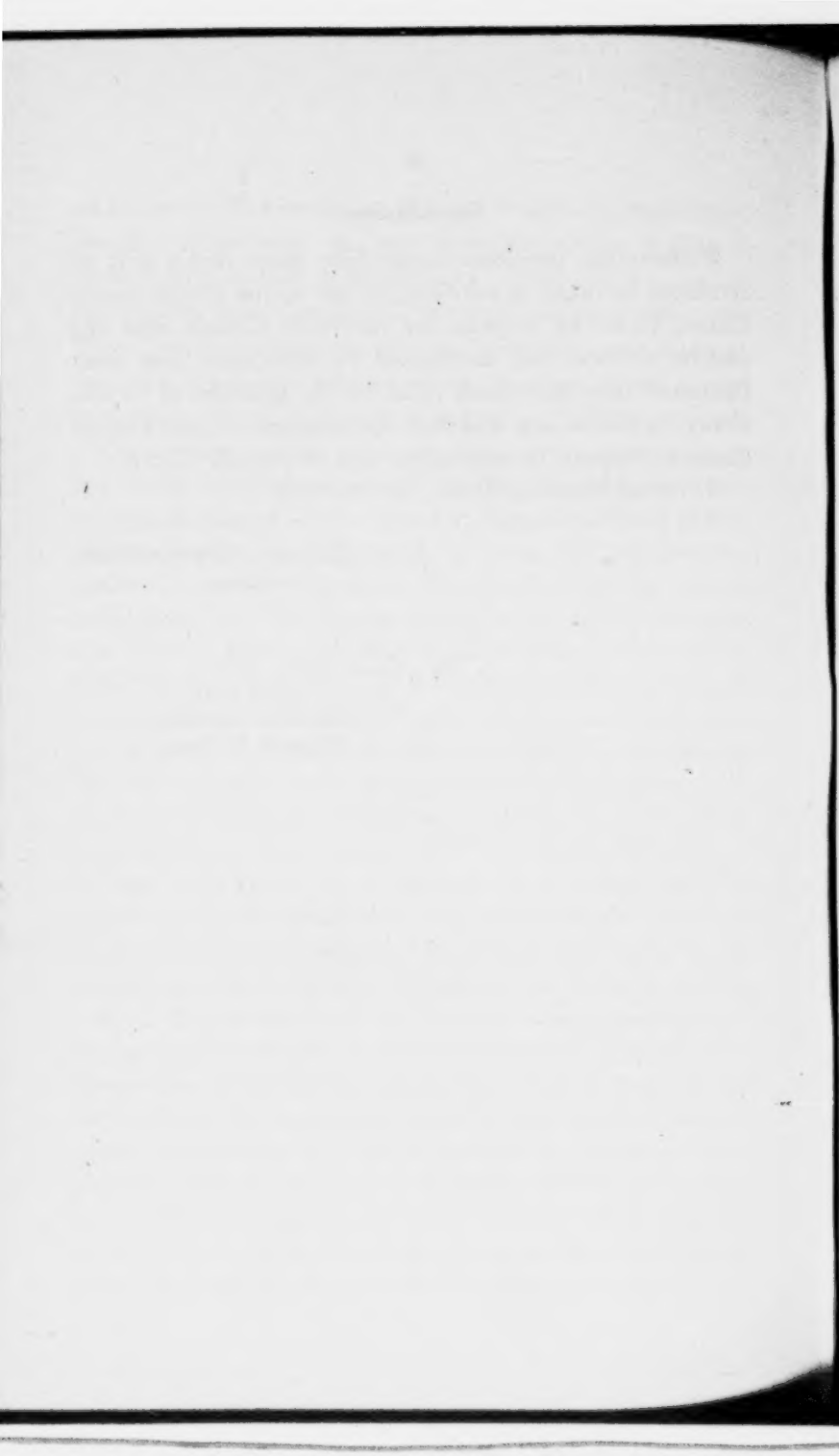
DATED at Houston, Texas, May 9, 1946.

KIRBY LUMBER CORPORATION,
Petitioner,

By



JOYCE COX,
2828 Gulf Building,
Houston 2, Texas



No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1945

KIRBY LUMBER CORPORATION, *Petitioner*,

v.

DENMAN KOUNTZE, ET AL., *Respondents*

PETITIONER'S SUPPORTING BRIEF
ON PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The opinion of the Circuit Court of Appeals (R. 136-139) is reported in 153 Fed. (2d) 695. Jurisdiction of this Court is invoked under JUDICIAL CODE, Section 240 as amended, 28 U. S. C. A., Section 347, upon the theory that the Court below decided an important question of local law in a way probably in conflict with applicable local decisions. Rule 38, 5(b) of the Supreme Court. We contend the Court below has misapplied the all-important basic mineral and conveying laws of Texas, with a result different from what would have been the result in the State Courts, and created a harmful precedent in a field of law vitally

important to the greatest oil producing State, besides working great injury to Petitioner.

The Texas Land & Cattle Company on July 5, 1902, conveyed a large quantity of land in Tyler and San Augustine Counties, Texas, to John Henry Kirby (R. 45-54). Petitioner is successor to Kirby's rights, Respondents are successors to the grantor's rights. The lands are conveyed with certain reservations and exceptions, and with certain covenants, which are the genesis of the present dispute. They are quoted in the margin.¹

¹ 1. "Excepting And Reserving, however, from this conveyance, unto the said grantor, its successors and assigns forever, ninety-five per cent (95%) of any and all oil upon, within or under the aforesaid lands, hereby conveyed and every part thereof, with the full and complete rights and powers following, to-wit:

2. "To, at any and all times, enter upon said lands and every part thereof, and thereon, therein and thereunder to search for, sink, drive, dig and bore for, mine, work, and get all of the oil found upon, within or under said lands and every part thereof, and to ship, transport, take away and dispose of ninety-five per cent. (95%) of all the oil, so obtained.

3. "To, at any and all times, on said land, manufacture, handle, refine and treat aforesaid ninety-five per cent (95%) of said oil, and to ship, transport, take away and dispose of any and all products, materials and things so obtained:

4. "To, at any and all times, lay down, construct, maintain, use and operate in, upon and over said lands or any part thereof, pipes, pipe-lines, roads, tramroads and all other appliances and means of transportation necessary and proper for the transportation of said oil and other products obtained by the manufacturing, handling, refining and treating the same and for the transportation of the tools, machinery and supplies of every nature necessary and proper in obtaining said oil from the ground, manufacturing, handling, treating or refining the same, and in storing, caring for and handling said oil or any product obtained therefrom.

5. "In the convenient and proper accomplishment of the purposes and things aforesaid to, at any and all times, erect, set up, use, maintain and operate on said land or any part thereof steam and other engines, machinery, works, tanks, furnaces, buildings, houses and other structures, and at pleasure to remove and carry away the same; to, at any time and all times, use any part of the

The case originated in the Eastern District of Texas as a proceeding for declaratory judgment under JUDICIAL CODE, Section 274(d), with jurisdiction based on diversity of citizenship and value exceeding \$3000.00 in controversy (Tr. pp. 2-3, Par. II, Petition; allegations admitted, R. 14, Par. II; R. 130 FN). The issues were narrowed by stipulation as follows: (*Substituting Petitioner for Defendant, and Respondents for Plaintiffs*):

"Petitioner admits that Respondents has power to execute an oil lease covering the full estate in the oil

surface of the land for storing or placing thereon said oil and products derived from manufacturing, handling, refining and treating the same and the rubbish and other materials incident to such operations; to take and use, free of charge, for any of the purposes aforesaid, all water on said lands, loose stone and rock lying on the surface; to take and use for any of the purposes aforesaid, upon paying the fair value thereof, all the timber on said lands or any part thereof under fifteen inches in diameter; to have free ingress, egress and regress at all times in and upon said lands and every part thereof for the purposes aforesaid; to do all such other acts and things not expressly named herein as may be necessary and convenient to obtain the full benefit of the property, rights and powers by this instrument excepted and reserved.

6. "There is also hereby Expressly Reserved to and conferred upon said grantor, its successors and assigns, the full and absolute right and power in good faith to sell and convey the whole of the oil under, within and upon said lands hereby conveyed or any part thereof, and any conveyance or conveyances so made shall pass to the grantee or grantees therein the whole of the oil upon, within and under the particular land designated and described in said conveyance or conveyances; but in such event said vendor or vendors shall pay or deliver to said John H. Kirby, his heirs, executors, administrators or assigns, then owning the interest in said oil not herein and hereby reserved one-twentieth of the purchase price obtained upon said sale.

7. "In the event of any such sale or sales, the purchaser or purchasers, his or their heirs, executors, administrators and assigns, shall have all and the same rights and powers as to said five per cent. (5%) of said oil as are by this instrument reserved and conferred as to said ninety-five per cent. (95%).

in place. The issue to be litigated in this case is the question of whether Petitioner is entitled, upon execution of such a lease by Respondents, to—

"(1) Only 1/20th or 5% of all royalty provided in any such lease, as contended by Respondents, or

"(2) A royalty of 1/20th or 5% of all oil produced, as contended by Petitioner; or

"(3) Both a royalty of 1/20th or 5% of all oil produced, to be paid to it by the lessee, and 1/20th or 5% of all royalties paid by the lessee to Respondents" (R. 44).

The case was tried before Judge Randolph Bryant who on June 16, 1945, entered judgment as follows:

"And the Court finds, and accordingly Orders, Ad-

8. "The aforesaid rights and powers hereby reserved and conferred may be exercised not only by the said grantor, its successors and assigns, but by its or their lessees, agents and workmen and any and all other persons by its or their authority or permission; and neither the said grantor nor any of the aforesaid persons deriving their powers mediately or immediately from or through it shall be liable or responsible for any damage or injury whatever which shall or may be caused to said lands or anything thereon by the doing of any of the acts or things the right to do or perform which is hereby reserved and conferred.

9. "It is distinctly understood and agreed that said grantor, its successors and assigns, shall deliver to the said John H. Kirby, his heirs, executors, administrators and assigns, at any well bored or sunk in said lands the one-twentieth part of all crude oil produced and saved from said well. If there is a pipe-line connected with said well, the said one-twentieth shall be delivered in said pipe-line to the credit of the party entitled thereto; if there is no pipe-line connected with said well, then said party entitled to said one-twentieth shall, at his own proper cost and charge, provide the means of saving, receiving and storing his said one-twentieth. This obligation to deliver one-twentieth of said oil shall be one running with the ownership of the well, and when said grantor or any person or persons succeeding to its interest disposes of any interest in any well there shall no longer rest upon it or them any obligation to perform this covenant, but such obligation shall thereupon attach to the person or persons succeeding to such interest."

judges and Decrees, that the terms of said deed are not ambiguous with respect to the issues before the Court for determination; that Plaintiffs as they are successors in interest to the grantor in said deed have the right to execute leases covering the full estate in the oil in place under all or any part of said lands or under any part of said lands; that Defendant is entitled to a royalty of 1/20th, or five (5%) per cent, of all oil produced from said lands or any part thereof; and that Defendant is additionally entitled to 1/20th, or five (5%) per cent of all bonus, delay rentals and royalties received by Plaintiffs as a result of the execution of any oil lease upon said lands or any part or parts thereof" (R. 120).

To the same effect are his findings of fact and conclusions of law (R. 109-118).

The Circuit Court of Appeals reversed Judge Bryant's judgment on February 18, 1946, holding that under the terms of the deed, Petitioner is entitled, upon lease by Respondents of the oil under said lands, only to 5% of the proceeds received by Respondents from said lease, and is not entitled to the 5% royalty as provided for in Paragraph 9 of the deed (Tr. 130-139; Judgment, R. 140).

Points of Error

We contend that the Circuit Court of Appeals erred, under the governing laws, in holding:

1. That upon Respondents executing an oil lease covering the full estate in the oil in place on the lands in question, Petitioner is entitled only to 1/20th or 5% of all royalty provided in any such lease.

2. That upon the execution by Respondents of

a lease covering the full estate in the oil in place on the lands in question, Petitioner is not entitled to a royalty of 1/20th or 5% of oil produced, to be paid to Petitioner by the Lessee.

3. That Petitioner is not entitled, upon the execution by Respondents of a lease covering the full estate in the oil in place, both to a royalty of 1/20th or 5% of all oil produced, to be paid to Petitioner by the Lessee, and 1/20th or 5% of all royalties paid by the Lessee to Respondents.

Argument

1. *Basic Principles of Texas Law Confused and Not Applied by the Circuit Court of Appeals*

An eminent authority says " * * * that the legal interest of a Texas landowner in the oil and gas under his land purports to be determined on the basis of their physical similarities to a block of granite, while the interest of a Louisiana landowner in the oil and gas under his land, just across the State line, purports to be determined on the basis of their physical likenesses to wild game." (18 TEX. LAW REVIEW, p. 28.)²

Supporting and illustrating cases are: TEXAS CO. v. DAUGHERTY, 107 Tex. 226, 176 S.W. 717 (1915); PRAIRIE OIL & GAS CO. v. STATE, 231 S.W. 1088 (Tex. Com. App. 1921); STEPHENS COUNTY v. MID-KANSAS OIL & GAS CO., 113 Tex. 160, 254 S.W. 290 (1923); HAGER v. STAKES, 116 Tex. 453, 294 S.W. 835 (1927); BROWN v. HUMBLE OIL & REFINING CO., 126 Tex. 296, 83 S.W. (2d) 935 (1935), on rehearing, 87 S.W. (2d) 1069 (1935); RAILROAD COMMISSION OF TEXAS v. MAGNOLIA PETROLEUM CO., 130 Tex. 484, 109 S.W. (2d) 967 (1937); TEXOMA NATURAL GAS

² W. L. Summers, *Legal Rights Against Drainage*, 18 Texas Law Review, 27, 28.

CO. V. TERRELL, 2 F. Supp. 168 (W. D. Tex. 1932); CANADIAN RIVER GAS CO. V. TERRELL, 4 F. Supp. 222 (W. D. Tex. 1933). See also THOMPSON V. CONSOLIDATED GAS CO., 300 U.S. 55, 68.

Royalties and other rights, either to a part of the oil as personalty after production or to money measured in production, are under the Texas Law regarded as proceeds from the sale of minerals in place, and insofar as their character as real estate or personalty is concerned, are regarded as real property but incorporeal hereditaments and not ownership of oil in place. The authorities carefully distinguish such rights from ownership of the oil in place; and the ownership of such rights by one person or set of persons is entirely consistent with, indeed most commonly associated with, the ownership of all the minerals in place by others. The rules are the same, whether the owner of the incorporeal interest is entitled to a part of the oil after production and as personalty, or money measured by production. See MCLEAN V. STATE, 181 S.W. (2d) 725, writ of error refused; LOCKHART V. WILLIAMS, 192 S.W. (2d) 146 (Sup. Ct. not yet officially reported).

In ATTORNEY GENERAL V. HATCHER, 115 Tex. 332, 281 S.W. 192 (1926), it was held that royalties on leases of University lands were "proceeds" from the sale of the minerals in these lands and were not income. In STEPHENS V. STEPHENS, 292 S.W. 290, writ dismissed, it was held that royalties derived from a lease of separate property of the husband were proceeds from the sale of the land and therefore separate property of the husband. In TEXAS COMPANY V. DAUGHERTY, 107 Tex. 226, 176 S.W. 717, the lease was a conveyance upon limitation with royalty. The grant was said to be of "all the oil, gas, coal and other minerals," that is a grant of all the minerals in place.

The following from STEPHENS COUNTY, ET AL., V. MID-

KANSAS OIL & GAS COMPANY, 113 Tex. 160, 254 S.W. 290, may be helpful:

(P. 292) "Ownership of the gas and oil *in place* meant having the exclusive right to possess, use and dispose of the gas and oil. The grantors were clearly divested of the right to either possess, use or dispose of the gas and oil *in place* in the lands described in the instruments here involved as soon as the instruments were executed. At the same instant, the right to possess, use and dispose of such gas and oil *in place* passed to the grantees in said instruments and to their assigns. Complete divestiture of title to the gas and oil could hardly be more clearly evinced than by the necessity for an express grant or reservation of even enough gas for domestic use in the grantors' dwellings. Dominion over a thing could not well be completer than it is in those persons who may, at their will, assign it to any other person, with or without consideration, for a time which may be forever. *Sims v. Sealy*, 53 Texas Civ. App. 518, 116 S.W. 630. The fact that whoever owns the gas and oil, under these instruments, is subject to certain obligations to the former owners, express and implied, with regard to exploration for, and production of, the gas and oil, and with regard to the payment of royalties, in no wise reinvests the former owners with title. Nor does the possibility of future reversions accomplish present re-investitures of title in the former owners." (Emphasis ours.)

* * *

(P. 294) "Notwithstanding the distinctions attempted to be drawn in the decisions, we cannot conclude otherwise than that there is no real difference in the title conveyed whether an instrument takes the form of a grant of the exclusive right to mine and appropriate all of a certain mineral—as in *Benevides v. Hunt*, *supra*,—or takes the form of a demise of the land, for the sole purpose of mining operations, coupled with a grant of the ex-

clusive right to produce and dispose of the mineral—as in this case—or takes the form of a grant of the mineral with the exclusive right to mine for, produce, and dispose thereof—as in *Texas Company v. Daugherty*, supra. The results are substantially the same to all parties at interest, whether the one or other form of instrument be used. Why hold that instruments in different forms create different estates, where there is no difference in fact with respect to that of which each divests the grantor, his heirs or assigns, nor with respect to that with which each invests the grantee, his heirs or assigns?”

* * *

- (P. 295) “The instruments mentioned in the certificate of the Court of Civil Appeals have passed to appellee determinable fees in the lands; leaving in the grantors, their heirs or assigns, the possibility of reacquiring the absolute fee simple titles, less whatever minerals may be meantime produced and marketed.”

In the *HATCHER* case, 2 LEAKE’S LAW OF PROPERTY IN LAND, page 55, is quoted with approval as follows:

“ ‘A lease of minerals or a license to take minerals for a term of years is equivalent to a sale out and out of so much of the soil itself as consists of the minerals to be taken, and the rent reserved upon a mineral lease is not like the ordinary rent or reservation of annual profits, but in effect a payment in installments of the price of the minerals sold. It is usual to reserve it in the form of a royalty, that is a proportion of the minerals worked or of their value.’ ”

In *EHLINGER v. CLARK*, 117 Tex. 547, 8 S.W. (2d) 666, opinion by CHIEF JUSTICE CURETON, it was held that a lease for cash and deferred cash consideration, and royalty, is a sale of the minerals in place (8 S.W. (2d) at 670), a sale of “the whole of its mineral estate in the land” (670), “the consideration” was the cash and right to receive oil as per-

sonalty after production (670). The lands (minerals) were "sold on a royalty basis" (672). The Court felt that \$4,000.00 and the royalty promised was "a fair price for the whole of the oil in place in the bowels of the earth" (672). The contract is the "usual one—by those who sell mineral rights."

In *THEISEN V. ROBISON*, 117 Tex. 489, 8 S.W. (2d) 646, at 650, the Court says "at the date of the adoption of the Constitution and for prior centuries minerals were usually converted into money by sales working a severance of the mineral estate, consummated by means of writings commonly called leases." The Constitution in question was adopted in 1876, before oil development in Texas. It was held in this case that the lease on royalty and cash consideration was sale of all the minerals.

Section 4 of Article 7 of the CONSTITUTION reads in part as follows:

"The lands herein set apart to the Public Free School Fund shall be sold under such regulations, at such times, and on such terms as may be prescribed by law."

The so-called "Relinquishment Act" Articles 5367 through 5382, R. C. S. 1925, enacted in 1919, was sustained by the Supreme Court as Constitutional under the foregoing provision in *GREENE V. ROBISON*, 117 Tex. 516, 8 S.W. (2d) 655.

Section 2 of the aforesaid Act (Article 5368, R. C. S. 1925) conferred the following powers upon the owner of the surface with respect to minerals reserved to the State:

"The owner of said land is hereby authorized to sell or lease to any person, firm or corporation the oil and gas that may be thereon or therein upon such terms and conditions as such owner may deem best, subject only to the provisions hereof, and he may have a second lien

thereon to secure the payment of any sum due him. All leases and sales so made shall be assignable. No oil or gas rights shall be sold or leased hereunder for less than ten cents per acre per year plus royalty, and the lessee or purchaser shall in every case pay the State ten cents per acre per year of sales and rentals; and in case of production shall pay the State the undivided one-sixteenth of the value of the oil and gas reserved herein, and like amounts to the owner of the soil."

It will be noted that this Act provided that the owner of the land might "sell or lease" the oil and gas. And "all leases and sales" so made shall be assignable. It has been held that in view of the terms of the Act, the owner of the land may *only* execute leases. *STATE V. MAGNOLIA PETROLEUM COMPANY*, 173 S.W. (2d) 186, writ refused.

In *AVIS, ET AL., V. FIRST NATIONAL BANK OF WICHITA FALLS*, 141 Tex. 489, 174 S.W. (2d) 255, the Court say of the power vested by will in a trustee to sell, as applied to the execution of an oil and gas lease with covenants of royalty:

(P. 258.) "Whatever confusion may have existed years ago about the nature of an oil and gas lease, caused by early opinions of this Court, same was clarified by its later opinions. This Court has definitely declared that an oil and gas lease is the same as the sale of real estate."
* * *

(P. 259.) "By the terms of the will the trustee was authorized to execute an oil gas lease on the land conveyed in trust by the will."

In *SHEPPARD V. STANOLIND OIL & GAS COMPANY*, 125 S.W. (2d) 643, writ refused, the Court say:

(P. 647.) "In this state leases of this character are held to be conveyances of the mineral title in fee upon limitation. Consequently everything paid or contracted,

whether in money or in oil or its proceeds, as distinguished from delay rentals, constitutes a part of the purchase price for the lease. In this particular the 'oil bonus' (the term usually applied to the sums under consideration) stands upon the same footing as the cash bonus. But here the analogy between the oil bonus and money bonus (whether cash or deferred) ends. Royalty also is on the same footing as bonus, cash, deferred, or oil, as regards representing a part of the purchase price for the lease. And this is true for another reason: Oil in place is a part of the land. It constitutes real estate. When it is severed from the soil, the land itself is taken (wasted) to that extent, and the corpus of the estate in the land is to that extent depleted. Consequently anything which the lessor receives, in whatever form, in consideration for the oil taken or to be taken from the land, constitutes a part of the purchase price of the title to the oil, and therefore of the land. *State v. Hatcher*, 115 Tex. 332, 281 S.W. 192; *Andrews v. Brown*, Tex. Civ. App., 283 S.W. 288. * * *

See also *STATE NATIONAL BANK v. MORGAN*, 135 Tex. 509, 143 S.W. (2d) 757, 760; *ANDREWS v. BROWN*, 283 S.W. 288, 292-3; *SUMMERS OIL AND GAS* (Per. Ed.), p. 347, Par. 571, Id., p. 391, Par. 586.

The canons of construction which come into play and which we contend the Court below violated and misused are sufficiently stated in *CARTWRIGHT v. TRUEBLOOD*, 90 Tex. 535, 39 S.W. 930 as follows:

"Before examining the language of the deed, we will state some of the rules which must govern in the construction of it, and in arriving at the intention of the parties. Every part of the deed must be given effect if it can be done, and, when all of the parts are harmonized, the largest estate that its terms will permit of will be conferred upon the grantee. (*Hancock v. Butler*, 21

Tex. 816.) If the language cannot be harmonized, from which an ambiguity arises in the deed, so that it is susceptible of two constructions, that interpretation will be adopted which is most favorable to the grantee."

2. *Analysis of the Circuit Court of Appeals' Opinion*

We have already commented, in the petition, on the basic contradiction in premises in the Circuit Court of Appeals' opinion. Briefly the Court acts upon the premise that a lease with a royalty reservation is a conveyance to the lessee of all the minerals in place, and holds, contradictorily, that the existence in petitioner of a royalty interest after lease would prevent the lease from vesting all the minerals in place in the lessee. In this contradiction exists the highlight of the Court's failure to comprehend and apply the Texas law. This failure is further exemplified in the detail of the opinion.

In describing the deed's sixth paragraph, the Court says that the grantor reserves power "to sell and convey the whole of the oil" (Tr. 132). Significantly there is no comment on or mention of the qualifying words which limit this power to conveyance of the oil in place. The oil that may be conveyed is "the whole of the oil *under, within and upon said land * * **, *that is the oil in place*, and not Petitioner's royalty interest under Paragraph 9 of the deed, existing as an incorporeal right with respect to, but not ownership of, oil in place.

The same misapprehension and inconsistency appear in the Court's finding that petitioner's construction causes a conflict in the deed because a Paragraph 6 purchaser by lease would obtain the whole of the oil, whereas under Paragraph 9 petitioner would have 5% of the oil (R. 136). Here is error of minds thinking solely in terms of the law of capture. Oil is oil; and there is no distinction between its owner-

ship in place and royalty interest, a distinction basic in Texas (R. 136).

The same misconceptions and confusion follow in the Court's treatment of Paragraph 9, first in the statement that Paragraph 9 applies only so long as Respondents do not sell any of the oil, or sell only 95% of it (R. 137). Here again, to the Court, 5% of the oil in place is 5% of the oil produced—a confusion of the nature of fee and royalty. The Court says (full paragraph, R. 137) that the vendee of all the oil is not a successor or assign of Respondents. This, we submit, is violence to clear language and law. It is impossible, says the Court (full paragraph, R. 137), for a lessee to be the owner of all the oil in place, and at the same time be under obligation to pay 1/20th royalty to the petitioner; and yet the result below is possible only if a lease by Respondents vest in the lessee 100% ownership of the oil in place notwithstanding it provides for royalty payments to Petitioner and Respondents. This 100% vesting could not be if "royalty" is ownership of part of the oil in place; such a lease would not be a disposal of "the whole of the oil, under within and upon said lands—or any part thereof," as required by Paragraph 6. The Court proves too much.

In this same paragraph is a holding that a vendee of all the oil is not a successor or assign of Respondents (R. 137). This holding, we submit, is violence to language and law. Also the Court mentions here only one sentence of Paragraph 9. There is not mentioned the explanatory "this obligation to deliver 1/20th of said oil shall be one running with the ownership of the well—" and following words. The owner of the well is the owner of the minerals in place—all the minerals in place and not part of them. This clause and the balance of deed Paragraph 9, are eviscerated, completing the process of destruction which frustrates the plain in-

tent of the parties and the clear application of Texas mineral law and canons of construction.

At this point we desire to challenge as erroneous a statement as to the record. It is recited that the stipulation provides "(2) that the appellee is entitled to 5% of all royalty provided in said lease; (3) that the controversy is limited to the question of whether the appellee is entitled, upon the execution of a lease, to 5% of all oil produced in addition to 5% of all royalty provided in such lease" (R. 133-4). This same "agreement" is adverted to later (R. 135), and seems to be important in the thought of the Court. These statements are not borne out by the stipulation, which is as printed in the margin of the opinion and set out above. This error of the Court gives a false starting point, we believe, for its entire argument; and it undoubtedly gives a false picture of the position of the parties. Respondents asserted alternative one of the stipulation. Petitioner asserted alternative two as its position, and then suggested that alternative three was a possibility.

Another error of the Circuit Court of Appeals is in fixing Petitioner's right as the right of a co-tenant owning 5% of the oil in place, and deriving its right to 5% of production from that status. It is true that the deed provides for co-tenancy; but the proposition that Petitioner's right to 5% of production flows from this relationship is not true. That right comes from Paragraph 9 at all stages. One co-tenant developing oil accounts to the non-participating co-tenant, not proportionately for the gross oil produced, but for his proportion less expenses of production. *BURNHAM V. HARDY OIL COMPANY*, 108 Tex. 555, 195 S.W. 1139. Hence the 5% of gross production which Petitioner is entitled to receive is by virtue of Paragraph 9, which confers the royalty right, and related provisions which, were they not present, would force Respondents to account, on development by

themselves, for 5% royalty under Paragraph 9 and for 5% net from production to Petitioner as co-tenant.

We are at a loss to understand why the Court computed royalty as it did, unless it manifests a general thought of the Court that the contract as we construe it gives to Petitioner too much. Such evaluations have no part in the construction of the agreement. This computation comes from Respondents' brief below. It is true that 1/8th royalty is quite customary; but on this land 1/6th royalty was obtained in one lease (R. 16-42 at 31; stipulation of correctness of copy, R. 44). This was divided by agreement, 7/60ths to Respondents and 3/60ths or 1/20th of the gross production to Petitioner, as we contend we are entitled to receive from any lessee. 1/10th royalty was prevalent prior to the execution of the 1902 deed (R. 83-97). The purpose of the computation of the Court is obscure; and we here challenge its relevancy.

One last feature of the Court's opinion we mention specifically. The Court holds that the provisions of Paragraph 7 giving the lessee the same rights and powers with respect to "said five per cent (570)" as he obtains with respect to 95% conflicts with Paragraph 9, under which Petitioner would be entitled to 5% of the oil produced (R. 136). This reasoning is to create rather than avoid ambiguity, with a resulting nullification of the intent of Paragraph 9, and the creation of more difficulties and ambiguities than are purported to be solved. "Said five per cent" is oil in place; the powers vested are solely as to oil in place. Paragraph 7 does mention purchasers, which the Court, we believe, correctly holds to be lessees among others. Paragraph 8 continues that "the aforesaid rights and powers—may be exercised not only by said grantor, its successors and assigns, but by its or their lessees, agent and workmen" and others by authority. This indicates that the rights and powers contemplated at this

portion of the agreement were such as may be exercised by workmen, agents, etc. Does this vest ownership of the oil in place in workmen? And thus likewise destroy Paragraph 9? In the grantor, with the same result? The answer is a negative. The key is the fact that what is referred to here is not title, not the incorporeal royalty right of Paragraph 9, but the right of ingress and egress, of felling timber, exploration, etc., the powers exercisable with respect to oil in place. With this, the only reasonable interpretation, all difficulties of the Court below vanish.

We believe that we have sufficiently illustrated that the decision below flows from misinterpretation and misapplication of the Texas law and of the intent of the parties under applicable rules of construction. We now proceed to show that under our theory, all the difficulties purportedly found by the Court below are non-existent, and that under our contention the results required by Texas law are achieved.

3. Interpretation of Paragraph 9 in Connection With the Deed as a Whole.

There are, relevant to our inquiry, three parts of this deed, essentially different and serving variant purposes. *First*, is the granting clause, followed by description of the land. *Second*, appear certain clauses of exception and reservation, being Paragraphs 1 to 8, inclusive. *Third*, there is a clause of covenant, Paragraph 9.

The parties definitely distinguished, as must we, between ownership of oil in place, and the right to receive oil upon production by virtue of a real covenant. This distinction is made in the conveyance as clearly as it has been made by authority before and since; and the distinction is important in arriving at the intent of the parties.

There is a grant of all the lands described "save and ex-

cept the reservations and exceptions therefrom hereinafter made" (R. 3).

Excepted or reserved are 95 per cent of the oil in place, and "the full and complete rights and powers following" (Par. 1). There follow by way of reservation and exception, so denominated, the powers set out in Paragraphs 2 to 8, inclusive. On sale of all the oil in place, grantors are required to pay or deliver to grantee 5 per cent of the purchase price obtained (Par. 6).

Thereafter, in Paragraph 9, follows a matter textually distinguished from, and in idea and legal classification wholly different from, everything that goes before, to-wit, an agreement, an agreement having nothing to do with ownership of oil in place except that it imposes upon the oil in place and the owner thereof, howsoever and to whomsoever such ownership may pass, a real covenant for the benefit of John Henry Kirby, his heirs and assigns. We reproduce it:

"It is distinctly understood and agreed that said grantor, its successors, and assigns, shall deliver to the said John H. Kirby, his heirs, executors, administrators, and assigns, at any well bored, or sunk, in said lands, the one-twentieth part of all crude oil, produced, and saved from said well. If there is a pipe line connected with said well, the said one-twentieth shall be delivered in said pipe line to the credit of the party entitled thereto; if there is no pipe line connected with said well, then said party entitled, to said one-twentieth shall at his own proper cost and charge, provide the means for saving, receiving and storing, his said one-twentieth. This obligation to deliver one-twentieth of said Oil, shall be one running with the ownership of the Well and when said grantor or any person or persons succeeding to its interest dispose of any interest in any well, there shall no longer rest upon it or them any obligation to perform this covenant, but such obligation shall thereupon at-

tach to the person or persons succeeding to such interest."

Note the introduction of new thought by the phrase *It is distinctly understood and agreed*—. For eight paragraphs reservations and exceptions have been described and regulated; now, in sharp contrast, in both text and thought, we are in a new subject, the subject of a real covenant undertaken by the grantor and *to run with the ownership*—. Note the universality of the undertaking: It binds *Said grantor, its successors and assigns*—. None who succeed to this grantor's estate in the oil in place, by any form of conveyance, can ever escape it; no more all-inclusive description of all who could possibly succeed to ownership can be found.

Note also that three times it is stated that the obligation of any successor or assign of the grantor shall be to deliver to John Henry Kirby, his heirs and assigns *one-twentieth* of production. Language could not be clearer; and in result, whatever interpretation may be given to the various paragraphs dealing with the "exceptions" and "reservations," Kirby Lumber Corporation is entitled to the benefit of this real covenant for one-twentieth of all oil produced.

There is one feature of this Paragraph 9 which should be emphasized before turning from it. The obligation is always upon the person who owns the oil in place. A vendee of Texas Land and Cattle Company would owe this obligation directly to John Henry Kirby, his heirs or assigns. Anyone not owning the well, anyone not owning the oil in place, anyone who had sold the oil in place, would not owe the obligation to John Henry Kirby, his successors and assigns. *The obligation comes into operation after production, and upon the owner-producer; whereas the obligations in Paragraph 6 to pay one-twentieth of the purchase price obtained upon*

sale is upon the person who sells, and not upon the purchaser-producer.

Before passing from this particular Paragraph (9), we wish to devote momentary attention to the contention that there is repugnance between it as we construe it, and as it plainly reads, and Paragraph 6. Suppose there had been a reservation of all the oil in place, and the deed had contained the covenants of Paragraph 9; surely there would have been no repugnance. There was in fact a reservation of 95% of the oil in place and certain powers, with a provision for sharing of the proceeds of sale of all the oil in place, and these provisions were coupled with the covenants of Paragraph 9; with equal certainty there is no repugnance.

4. *The Nature of Rights in the 5% of the Oil in Place*

There is a reservation of 95 per cent of the oil in place. Stopping here, as the Court below seem to do in this connection, there would seem to be a conveyance of 5 per cent of the oil in place; and the grantor and the grantee would be tenants in common, owning 95 per cent and 5 per cent respectively of the oil in place. The parties to the instrument may have thought in such terms; but such a result is not legally sound, because the powers reserved to the grantor with respect to the 5 per cent of oil in place, not otherwise reserved, aggregate all powers of ownership of oil in place. The conveyance reserves and excepts both 95 per cent of the oil and certain powers. These powers, excepted and reserved to the grantor and denied to the grantee, include the following:

Exclusive power to explore for and possess all of the oil in place (Par. 2).

Exclusive power to sell all the oil in place (Par. 6).

Thus the Grantee could not himself exert any dominion

whatsoever over the oil in place, or dispose of it. He had no right to such oil in place, except that upon sale of all of the oil by the grantor, he had a right to receive from the seller "one-twentieth of the purchase price obtained." Thus the form of conveyance of 5 per cent of the oil in place was followed, the while the substance of such a conveyance was negated, and this for the one, and the only possible purpose, under the terms of the instrument, of assuring to the grantee 5 per cent of the "purchase price obtained" on a sale. Note, please, the safeguards thrown around the right of Kirby. The power was required to be exercised "in good faith" (Par. 6). Any such conveyance was required to "pass to the grantee or grantees the whole of the oil * * *." (Par. 6.) In other words, the grantor was to have the right to develop, yielding only the 5 per cent of the oil produced as provided by the subsequently appearing real covenant (Par. 9); but if the premises became valuable for oil and the grantor should find a market for all or a part of the oil in place, it was required on sale to sell all the 5 per cent and all the 95 per cent *in place*, and Kirby was to receive 5 per cent of the price received. The real covenant later appearing, to pay one-twentieth of the oil produced to Kirby and successors, was not to be affected by any such transaction. Its own terms made it binding on any purchaser in any such transaction. Clearly the parties to this conveyance assured to the grantee the right perpetually to receive 5 per cent of the oil produced, regardless of by whom produced and when, and also 5 per cent of any money made on trading in the oil in place.

5. *Meaning of the Term "Sale" as Used in Paragraph 6*

The question emerges, what constitutes a "sale" within the meaning of Paragraph 6. Any such sale must be a sale of "the whole of the oil" under the lands or any part thereof. Is an

oil lease containing provisions for royalties a sale within the meaning of this paragraph? The answer is simple, if a conveyance of all the oil in return for bonus and promise of royalty was regarded by the parties *as a sale of all the oil in place*; for it was expressly stipulated that

"Any such conveyance so made shall pass to the grantee or grantees therein *the whole of the oil * * **,"

and any conveyance which conveyed less than the entire 5 per cent and 95 per cent of the oil in place would not be within the reserved power.

We believe, with the respondents, that, within the intent of the parties, provision in an oil lease by them for royalty does not prevent such lease from constituting a sale of all the oil in place. We arrive at this conclusion in part from Paragraph 9, providing for an obligation, by way of real covenant and not by way of ownership by Kirby and successors of oil in place, an obligation imposed upon persons because they are the owners of all the minerals in place, to Kirby and successors who may not be the owners of any oil in place. The parties thought it perfectly consistent for an operator to be the owner of all the oil in place, and at the same time, indeed because of such ownership, to be burdened with a real covenant to pay 5 per cent of the oil produced to Kirby and successors, who would not own any of the oil in place. By the same token royalty obligations in a lease by respondents would be perfectly consistent with ownership by the lessee of all the minerals.

There are certain considerations which argue that Paragraph 6 does not contemplate a lease with reservation of royalties when it uses the term "sale," and which suggest that it contemplates only a sale by mineral deed that does not provide royalty payments to the grantors. If Paragraph 6

were not in the deed, the other terms of the deed would vest in the grantors the power to execute a lease empowering the lessee to produce all the oil. Thus Paragraph 8 classes Lessees with workmen and agents of grantor, its successors and assigns, as among those who may exercise the powers of exploration and development. There is no reason, quite apart from this express contemplation of lease, why the grantor, with power to explore for and produce all the oil, and to vest similar power in another, could not vest such power by instrument in the nature of lease. Further, the parties having used the term "sale" in Paragraph 6, and the word "lessee" in Paragraph 8, the question may logically be raised as to whether they meant to differentiate between sale and lease.

If the term "sale" means only a deed conveying all oil in place without provision for royalty, the obligations of Paragraph 9, whether mentioned or not in any such conveyance, would nevertheless follow through to the hands of the purchaser. He would be a successor or assign of Texas Land and Cattle Company. The real covenant would still bind the estate in his ownership; for Paragraph 9 so provides.

Likewise, if sale means only such a deed, leaving Texas Land and Cattle Company or successors no royalty interest, a lease could be executed by the respondents without accounting to petitioner for bonus, delay rentals or royalty reserved to themselves. In such case petitioner would be entitled only to 1/20th of the oil produced, under Paragraph 9.

We feel duty bound to call these considerations to the Court's attention, although despite them we are of the view that the term "sale" in Paragraph 6 includes the term "lease." One reason is the insistence of respondents that it does. Another is that, traditionally, a sale of minerals in place, has always been, generally, by "lease," and that in both legal and popular uses the terms, as applied to minerals in place, are used interchangeably. Also it is quite apparent that the

grantee, in the 1902 deed, obtained in the trade 1/20th of the oil produced by anyone, and additionally 5 per cent of any money made by dealing in the oil in place, as distinguished from operating to produce it. To achieve the latter purpose Paragraph 6 was written, the broader term "sale" being used, we believe, to include not only lease, in the sense of sale with royalty reservation, but also any sale that might be made without royalty reservation, so that, whatever kind of sale of the minerals in place the grantor might make, the grantee would be assured of 5 per cent of the proceeds.

6. *Meaning of the Phrase "Purchase Price Obtained Upon Said Sale" as Used in Paragraph 6*

What is meant by "purchase price obtained upon said sale," 1/20th of which must be "paid" or "delivered" to Kirby or successor upon a sale? It is obviously whatever is received for the conveyance of the oil in place by the grantor or successors. If the term "sale" does not mean "lease," the problem is simple. If it does mean "lease," the problem is more complicated. It would include "bonus" money paid for the execution of the lease. In popular speech, a royalty provision, together with covenants, are part of the "consideration" for a lease. See authorities cited above. Accordingly, a royalty is, or may be said to be, part of the "purchase price obtained upon said sale" unless the words "obtained upon said sale," are construed to limit the purchase price to that obtained at the time of the sale. They do not have to be so construed, but may be given a sense of anything obtained for the sale. As to delay rentals, under current lease forms they are not promises, and therefore not properly consideration for the lease. They are, rather, payments which the lessee has the option of making in lieu of drilling, drilling or payment having the effect of preventing the fee mineral estate from terminating upon a limitation.

These payments are susceptible of treatment as "purchase price obtained upon (in the sense payments arising out of) said sale."

Summarizing, construing the deed as we must, most strongly against the grantor, a lease is a sale, and the purchase price obtained upon said sale, 5 per cent of which must be yielded to petitioner, includes everything received by respondents arising out of the lease, including bonus, delay rental and royalty.

Conclusion

WHEREFORE, Petitioner prays as in the Conclusion to its Petition for Writ of Certiorari.

Respectfully submitted,

KIRBY LUMBER CORPORATION,
Petitioner

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No. [REDACTED] 104

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM

1945

KIRBY LUMBER CORPORATION, *Petitioner*

VS.

DENMAN KOUNTZE, ET AL., *Respondents*

ARGUMENT IN REPLY TO THE PETITION FOR WRIT OF
CERTIORARI OF THE KIRBY LUMBER CORPORATION

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No. 1224

IN THE SUPREME COURT
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OCTOBER TERM
1945

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DENMAN KOUNTZE, ET AL., *Respondents*

ARGUMENT IN REPLY TO THE PETITION FOR WRIT OF
CERTIORARI OF THE KIRBY LUMBER CORPORATION

TO THE HONORABLE SUPREME COURT OF THE UNITED
STATES:

Preliminary Statement

As is shown by the record herein and by the statement of facts contained in the petition for writ of certiorari, this case merely involves the construction of a deed by which the predecessor in title of the Respondents conveyed certain Texas lands to the predecessor in title of the Petitioner. No statutes or con-

stitutional provisions either of the State of Texas or of the United States enter into a determination of the case, and the record is devoid of federal questions of any kind or character. Petitioner seeks to invoke the jurisdiction of this Honorable Court under Rule 38 (5b) by alleging that the Court below decided an important question of local law in a way probably in conflict with applicable local decisions. Since Petitioner's allegations in this respect are intertwined with, and are virtually identical to, its arguments with respect to the merits of the case, the questions pertaining to jurisdiction and to the merits of the case will be discussed herein without segregation. Each of the numbered subdivisions of the ensuing argument is in reply to that portion of Petitioner's brief which bears a corresponding number.

Argument

1.

Throughout its petition for writ of certiorari and supporting argument, Petitioner has made a somewhat labored attempt to convince this Honorable Court that the Court below "misconceived and misapplied the Texas law" and that the result of this case "would have been different in the State Court, had the cause been litigated there." (See, for example, pages 3-6, 9, 21-25 of the petition for writ of certiorari, hereinafter abbreviated "P".) Any accusation that the Circuit Court for the Fifth Circuit has misconceived or confused the principles of Texas

mineral law bears on its face the elements of implausibility, for throughout the development of the petroleum industry in Texas, and especially in connection with the mass of litigation relating to the East Texas oil fields, the Circuit Court for the Fifth Circuit has been called upon to interpret and to apply the oil and gas law of Texas, and the decisions in which it has performed this task are legion. Indeed, either as a matter of counting decisions or as a matter of weighing the contributions of such decisions to the growth of Texas mineral law, one can seriously contend that the Circuit Court is on a par with the Supreme Court of Texas, and certainly the present oil and gas law of Texas owes more to the Circuit Court than it does to any one of the eleven Texas Courts of Civil Appeals.

In the case at bar, the untenable bases of such an accusation are well revealed by considering the specific charges which Petitioner has levelled at the opinion of the Court below. Under the heading "Basic Principles of Texas Law Confused and Not Applied by the Circuit Court of Appeals," Petitioner cites and quotes from a host of Texas decisions (P. 14-21). All of these decisions except the last evidently were inserted in some kind of an attempt to show that the Court below misconstrued principles which relate to the oil and gas law of Texas, and the last decision evidently was cited in a similar attempt to show that the Court failed to apply the appropriate canon of construction to the deed in question.

The first group of cases cited by Petitioner stand for nothing more or less than the following proposi-

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tions: (a) That Texas adheres to the doctrine of the ownership in place of oil and gas, rather than to the doctrine of capture which prevails in some jurisdictions. (b) That Texas recognizes a distinction between ownership of minerals in place and ownership of an incorporeal royalty interest. (c) That in Texas the usual mineral lease is construed as a sale of the minerals covered by the lease, and, thus, that such a lease commonly is treated as tantamount to an instrument of sale. (d) That in Texas the "purchase price" for a mineral lease includes, among other things, the delay rentals, bonuses and reserved royalties. Respondents challenge none of these principles and can only express their surprise that Petitioner deemed it necessary to consume so much space in expounding them. Such principles are the elemental bases of Texas mineral law; they are known and understood by everyone who has even a nodding acquaintance with the oil and gas law of Texas; and, whether expressed or unexpressed, such principles form the basic premises of the solution of any problem pertaining to Texas minerals. Far from being disregarded, "confused" or "not applied" by the Circuit Court of Appeals, such principles were at the very heart of that Court's decision in this case. Thus, in its opinion the Circuit Court recognized that the deed in question conveyed ownership of oil in place (Record, hereinafter abbreviated "R", 134-135); it recognized that as a result of such conveyance the grantor and the grantee became co-tenants of the oil in place (R. 134-135)—and even Petitioner admits that this is correct (P. 23); it recognized that in

Texas a mineral lease is tantamount to a sale of the minerals in place (R. 135); it recognized that the "purchase price" of a lease includes, *inter alia*, delay rentals, bonuses and reserved royalties (R. 135); and it recognized the existence of an incorporeal royalty interest or running covenant as something apart from ownership of minerals in place (R. 137). In other words, the Circuit Court of Appeals recognized and applied in this case each and every one of the basic principles expounded in those Texas decisions which form the bulk of Petitioner's argument herein. And, as will be more fully shown in the succeeding subdivision of this Argument, that Court's application of such principles was in full accord with other Texas decisions, and, indeed, was the only application of such principles which the Court could have made without departing from such decisions.

As stated above, Petitioner also contends that the Court below "confused and failed to apply" a canon of construction to the deed in question, and in this connection Petitioner quotes the recognized principle that when the provisions of a deed cannot be harmonized, the courts will adopt the construction which confers the largest estate upon the grantee. (P. 20-21.) To state that the Court below "confused" or disregarded this canon is to depart from facts which are plainly revealed in the record, for in its opinion the Court below recognized such a canon (R. 137-138), and, quite correctly, also recognized that in Texas this canon is held to be a tool of last resort which cannot be employed if a seeming ambiguity is capable of resolution by the use of other